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Docket No.

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In the Supreme Court of the United States

October Term, 1982

PEARLIE SIMMONS,
Petitioner

v.

SEA-LAND SERVICES, INC.,
Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

John H. Klein
BREIT, RUTTER & MONTAGNA
415 St. Paul's Blvd.
Norfolk, Virginia 23510
(804) 622-5000
and
Ralph Rabinowitz
RABINOWITZ, RAFAL & SWARTZ
P.O. Box 332
Norfolk, Virginia 23514
(804) 623-6674
Counsel for Petitioners

See Inside Covers For Cases Continued

MELVIN BANDY, For and on behalf of himself, individually, and
AMERICAN MUTUAL INSURANCE COMPANY of BOSTON,
Petitioners,

v.

BANK LINE, LTD.,
Respondent.

FRED L. SPRATLEY, For and on behalf of himself, individually and
ATLANTIC & GULF STEVEDORES, INC.,
Petitioners,

v.

HELLENTIC LINES, LTD.,
Respondent.

THOMAS E. McLEAN, and
ATLANTIC & GULF STEVEDORES, INC.,
Petitioners,

v.

CIA TRANSATLANTIC ESPANOLA, S.A.,
Respondent.

CHARLES A. CALDWELL, and
COMMERCIAL UNION INSURANCE COMPANY,
Petitioners,

v.

OGDEN SEA TRANSPORT, INC.,
Respondent.

WALLACE CURRY, and
ATLANTIC AND GULF STEVEDORES, INC.,
Petitioners,

v.

COMPANIA CRASATLANTICA ESPANOLA, S.A.,
Respondent.

WILBERT C. HAROLD, For and on behalf of himself, individually,
and
THE HARTFORD ACCIDENT INDEMNITY INSURANCE COMPANY,

v.

COMPANHIA DE NAVEGACAO MARITIMA NETUMAR,
Respondent.

IN THE
SUPREME COURT OF THE
UNITED STATES

Pearlie Simmons,
Petitioner
v.
Sea-Land Services, Inc.,
Respondent.

Melvin Bandy, for and on behalf of
himself, individually, and
American Mutual Insurance Company of
Boston,
Petitioners,
v.
Bank Line, Ltd.,
Respondent.

Fred L. Spratley, for and on behalf of
himself, individually, and
Atlantic & Gulf Stevedores, Inc.,
Petitioners,
v.
Hellentic Lines, Ltd.,
Respondent.

Thomas E. McLean, and
Atlantic & Gulf Stevedores, Inc.,
Petitioners,
v.
CIA Transatlantic Espanola, S.A.,
Respondent.

Charles A. Caldwell, and
Commercial Union Insurance Company,
Petitioners,
v.
Ogden Sea Transport Inc.,

Respondent.

Wallace Curry, and
Atlantic and Gulf Stevedores, Inc.,
Petitioners
v.
Compania Crasatlantica Espanola, S.A.,
Respondent.

Wilbert C. Harold, for and on behalf of
himself, individually, and
The Hartford Accident Indemnity
Insurance Company,
Petitioners,
v.
Companhia De Navegacao Maritima Netumar,
Respondent.

QUESTIONS PRESENTED

I. Does the mere initiation of payment of compensation by an employer and acceptance of that initial compensation by a longshoreman constitute an "award in a compensation order filed by the deputy commissioner", where the only action by the deputy commissioner has been to file the employer's notice that compensation has been started?

II. Once the statutory assignment of 33 U.S.C. §933(b) has occurred and the employer possesses full control over the claim against the third party, may the employer voluntarily reassign to the longshoreman the right to sue?

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Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on April 12, 1982.

OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit in the instant matter is reported as Simmons v. Sea-Land Services Inc., 676 F.2d 106 (4th Cir. 1982), and is reprinted in the Appendix to this petition.

The opinion of the district court in Bandy v. Bank Line Ltd., is reported at 518 F.Supp. 1229 (E.D. Va. 1981), and is reprinted in the Appendix to this petition. The other opinions of the district court in the other consolidated cases herein are not reported, but are reprinted in the Appendix to this petition.

JURISDICTION

The opinion of the Court of Appeals for the Fourth Circuit sought to be reviewed was entered on April 21, 1982 and this petition for certiorari is filed within ninety days of that date.

No petition for rehearing has been filed in the Court of Appeals. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

Federal jurisdiction in the district courts in the instant matters existed pursuant to 28 U.S.C. §1332.

STATUTORY PROVISIONS INVOLVED

33 U.S.C §933(b): Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

STATEMENT OF THE CASE

Each of the instant cases involves a longshoreman who was injured on the

job and who initially accepted compensation without contravention by the respective employer. Disputes later arose as to the entitlement of some of the longshoremen to additional compensation benefits. Each longshoreman later brought an action against an allegedly negligent shipowner. In each case the district court concluded that the plaintiff had received "an award in a compensation order" more than six months prior to the institution of his suit, and that pursuant to 33 U.S.C. §933(b), the plaintiff no longer retained the right to sue the shipowner. The district court entered summary judgment in favor of the defendant in each case.

Each longshoreman filed his action more than six months after compensation payments were initiated. As the Court of Appeals noted, however, the pattern

of payments varied from case to case. Longshoremen Bandy, Caldwell, Curry, and Harrold, filed their actions more than six months after receiving their last compensation payments; none of them ever received a formal award. Longshoreman Simmons filed his action while receiving payments, though the payments had once been interrupted when he attempted to return to work; he did not receive a formal award. Longshoreman McLean filed his action while receiving compensation payments, but after the filing date he received a formal award of permanent total disability. Longshoreman Spratley filed his action while receiving payments and within six months of a formal order of permanent total disability. 676 F.2d at 109, n.3.

The Court of Appeals for the Fourth Circuit concluded that an award in a compensation order does not require

formal entry of an award in an order. Instead, the Court decided that an "informal award" would be sufficient to trigger the assignment provision of Section 33(b), relying upon the Fourth Circuit's prior decision in Liberty Mutual Insurance Company v. Ameta & Company, 564 F.2d 1097 (4th Cir. 1977). Thus, the Court of Appeals held that "an award in a compensation order" is created by the completion of three events:

> "(1) The employer, having not contravened its liability, initiates compensation payments to the longshoreman; (2) the deputy commissioner files the employer's notice that compensation payments have been initiated; and (3) the longshoreman accepts any of the payments." 676 F.2d at 109.

In addition, the Court of Appeals held that once the statutory assignment took effect, the employer could not

voluntarily reassign to the longshoreman the right to sue the third party. The Court of Appeals therefore affirmed the district court judgments against each of the instant longshoreman.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.

This Court recently decided in Rodriguez v. Compass Shipping Co., Ltd., 68 L.Ed. 2d 472 (1981), that Congress provided that a longshoreman loses all right to proceed against a negligent third party unless the longshoreman files suit within six months of acceptance of compensation "in an award in a compensation order filed by the Deputy Commissioner." In Rodriguez, this Court did not have before it and did not decide what constituted an award in a compensation order. In fact, this Court's grant of certiorari in Rodriguez

specifically did not extend to consideration of that question, though the petitioners in Rodriguez had sought such review. For the purposes of its decision, the Rodriguez court assumed that there had been awards so as to trigger the assignment provision of §33(b) of the Longshoremen's Act. Id. at 477, n.3. Thus, the Supreme Court opinion in Rodriguez is not useful in resolving the question of what is an award. Theodore v. Moore McCormack Lines Inc., 516 F.Supp. 25 (S.D. N.Y. 1981).

For purposes of its Rodriguez decision, this Court assumed that acceptance of compensation as made by the Rodriguez petitioners operated as an assignment. The petitioners in Rodriguez had accepted compensation in settlements of compensation claims, which were embodied in settlement

agreements signed by the plaintiff, his attorney, the employer's representative, and the Labor Department's claims examiner. See Rodriguez Court of Appeals Opinion, 617 F.2d 955, 957 (2d Cir. 1980). The Court of Appeals for the Second Circuit had held in Rodriguez that "an agreement settling an injured employee's claim to workmen's compensation signed after an informal conference with a claims examiner, by whom it was approved, constitutes an "award" within the meaning of §33(b)." Id. at 959. This definition of "award" was not disturbed by the Supreme Court on certiorari.

The result of the Second Circuit's rule was that longshoremen had at least the opportunity to consider the full compensation they would be receiving from their employers and to realize the full extent of the limited compensation

recovery before the six month period of limitation began to run. Such longshoremen would have received a copy of the settlement agreement and would know that their rights to compensation had been terminated. Any decision to sue a third party then could be made with full knowledge of all the rights and limitations afforded by the compensation remedy.

A review of the various provisions of §33(b) since the original enactment of the Longshoremen's Act in 1927 shows that Congress had a specific intention when it wrote the language contained in that section. Originally that section provided that acceptance of compensation worked an automatic assignment of the right to sue a third party. Congress amended this section in 1938 to provide that acceptance of compensation "under an award in a compensation order filed

by the Deputy Commissioner" worked an assignment of a longshoreman's right to sue. Finally, in 1959 Congress added the language that acceptance of such compensation in an award in a compensation order filed by the Deputy Commissioner operated as an assignment unless the longshoreman filed suit within six months after such award.

Cases decided under the 1938 version of the Act clearly established that mere acceptance of compensation was insufficient to effect an assignment of the longshoreman's right to sue. The rule was clear that there had to be an actual "award in a compensation order filed by the Deputy Commissioner". The United States Supreme Court held in American Stevedore Inc. v. Porello, 330 U.S. 446 (1946) that acceptance of compensation without an award does not operate as an assignment of the

employee's right to sue a negligent third party. Numerous lower court decisions concluded that unless there was compliance with the statutory language--an actual award in an actual compensation order actually filed by the Deputy Commissioner--there was no assignment of the right to sue. See Grasso v. Lorentzen, 56 F.Supp. 51 (S.D. N.Y. 1944), aff'd. 149 F.2d 127 (2d Cir. 1945), cert. denied, 326 U.S. 743; Tartaglia v. Cunard White Star Ltd., 56 F.Supp. 55 (S.D. N.Y. 1944); Brusich v. Grace Line Inc., 56 F.Supp. 48 (S.D. N.Y. 1944); Iaria v. Silver Line Ltd., 56 F.Supp. 42 (S.D. N.Y. 1943); Cupo v. Isthmian Steamship Company Inc., 56 F.Supp. 45 (S.D. N.Y. 1941); Roeben v. United States, 113 F.Supp. 732 (D. N.J. 1953).

The Court of Appeals for the Fourth Circuit in Simmons has

dramatically rewritten the definition of "award in a compensation order." In its Simmons opinion the Fourth Circuit has held that an award in a compensation order is created by the completion of three events. All that is necessary to create an award is that the employer initiate compensation payments to the longshoreman, the deputy commissioner file the employer's notice that compensation payments have been initiated, and the longshoreman accept any of the compensation payments.

The Fourth Circuit has focused solely on the word "award" and has completely ignored the phrase "in a compensation order." In creating its concept of "informal award," the Fourth Circuit has overlooked the additional requirement that there be a "compensation order." It seems indeed that the Fourth Circuit has called

Congress back into session "to cancel half a Line." Director, OWCP v. Rasmussen, 440 U.S. 29, 47 (1979).

The Longshoremen's Act establishes a workmen's compensation scheme based upon payment of compensation by the employer voluntarily and without an award. The Act provides in Section 14(a) "compensation under this Act shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer." 33 U.S.C. §914(a). The Act further provides in Section 14(c) that upon making the first payment of compensation, the employer shall immediately notify the deputy commissioner, in accordance with a form prescribed by the Secretary, that payment of compensation has begun. 33 U.S.C. §914(c). The form prescribed by

the Secretary when notifying the deputy commissioner is Form LS-206, Payment of Compensation Without Award. Yet the Fourth Circuit has focused on the filing of this very form (Payment of Compensation Without Award) to create a compensation award. The Fourth Circuit focuses on mere acceptance of compensation by the longshoreman as a pivotal event in determining when there has been "an award in a compensation order" although the payment has been made "without an award." In the logic of the Fourth Circuit, "payment of compensation without award" becomes "an award in a compensation order." The plain language of the statute has been turned inside out. Such a construction is surely incongruous and inappropriate for a statute which is to be construed in favor of injured employee and so as

to avoid harsh and incongruous results. Voris v. Eikel, 346 U.S. 328 (1953).

In American Stevedores v. Porello, supra., this Court concluded that mere acceptance of compensation benefits did not preclude an employee from suit against the third party. Instead, the Court recognized:

> "The apparent purpose of the Act is to provide payments during the period while the employee is unable to earn, when they are sorely needed, without compelling him to give up his right to sue a third party when he is least fit to make a judgment of election. For these reasons we think that mere acceptance of compensation payments does not preclude an injured employee from thereafter electing to sue a third party tortfeasor." 330 U.S. at 456.

The result of the Fourth Circuit's Simmons holding however does operate to cut off a longshoreman's right to sue

during a time he is unable to earn, when compensation benefits are sorely needed. Under Simmons, the statute of limitations for longshoremen becomes six months from the first compensation payment. Since the first compensation payment is ordinarily made within two weeks after the injury, longshoremen in the Fourth Circuit have a six month plus two weeks statute of limitations.

The results are dramatically different in the Second Circuit geographical area. In that Circuit, until there is a signed settlement agreement between the employer and the longshoreman, with approval from the Labor Department, there is no award. Rodriguez, 617 F.2d at 959.

In Verderame v. Torm Lines, 670 F.2d 5 (2d Cir. 1982), the Second Circuit had before it a longshoreman who was injured in June, 1975. He received

interim compensation payments, described as Payment of Compensation without Award, from then until January, 1977, when he filed a third party suit. He received compensation payments until August, 1978. At that time, the longshoreman and the employer entered into a settlement agreement, embodied in a Labor Department compensation order, requiring payment of an additional sum in settlement of the compensation claim. The Second Circuit held that until the amount of compensation benefits to be recovered by the injured longshoreman is fixed, either by order, stipulation of the parties, or informal award, there cannot be an "acceptance of compensation under an award in a compensation order" within the meaning of Section 33(b) of the Act. Id. at 7. Accordingly, since the longshoreman in Verderame brought suit prior to the settlement of his

compensation claim, the Court of Appeals reversed the district court's dismissal of his third party suit. In the Fourth Circuit however, plaintiff Verderame would have been barred from suit six months after his compensation payments began in June, 1975.

The Second Circuit followed similar reasoning in D'Amico v. Cia. de Nav. Mar. Netumar, 677 F.2d 249 (2d Cir. 1982). There, D'Amico was injured in December, 1974. He received interim compensation payments from his employer until September, 1975. The longshoreman and the employer then began settlement discussions, which culminated in a payment made by the employer in December, 1975. The Labor Department inquired of the longshoreman whether he was dissatisfied with the settlement, but he never responded. A formal order approving settlement was never entered

by the Labor Department. A third party suit was filed by the longshoreman in August, 1977. The district court dismissed the suit for being brought more than six months after the December, 1975 settlement payment. The Second Circuit reversed the dismissal on the grounds that further development of the facts was necessary to establish an approved settlement agreement which could be construed as an award. In the Fourth Circuit however, plaintiff D'Amico would have been barred from suit six months after his compensation payments began in December, 1974.

The significant difference between the period within which a longshoreman may sue in the Second Circuit and the far briefer period he may sue in the Fourth Circuit is indefensible. A federal statute requires a uniform national interpretation. Yet in the

Second Circuit, longshoremen can sue third parties even though the longshoremen have received interim compensation payments, until there is an approved compensation settlement. However in the Fourth Circuit, longshoremen cannot sue more than six months after acceptance of their very first compensation payment. In the Second Circuit each of the petitioners here before this Court would retain his right to sue; in the Fourth Circuit none retained that right. There is, of course, no statutory language which would support the different interpretation of the Longshoremen's Act in Norfolk, Baltimore, or Charleston from that in New York City. All American longshoremen should have an equal opportunity to prosecute third party claims. Review by this Court is

necessary to provide a uniform national interpretation.

This petition presents a question of federal law which should be, but has not been, settled by this Court. Already a split of authority exists between the Second Circuit and the Fourth Circuit. In addition, the District Court for the District of Columbia has rejected the Fourth Circuit view and declined to hold that mere acceptance of compensation benefits by an injured employee, without approval of a settlement by the Labor Department, constitutes and award in a compensation order. Collier v. John Mendis Inc., 526 F.Supp. 459 (D. D.C. 1981); Fearson v. Johns-Manville Sales Corporation, 525 F.Supp. 671 (D. D.C. 1981). The district court in the Eastern District of Pennsylvania also declines to find an award in a compensation order upon mere

receipt of compensation and notice to the Labor Department that compensation has been started. Klitznsky v. Pakistan Shipping Corporation, 530 F.Supp. 326 (E.D. Pa. 1981); Dunbar v. Retla Steamship Co., 484 F.Supp. 1308 (E.D. Pa. 1980). There too the Fourth Circuit view has been rejected. Also, the district court for the Western District of Washington has refused to consider mere acceptance of compensation sufficient to constitute an award. Sea Quest Marine Inc. v. Cove Shipping Inc., 474 F.Supp. 166 (W.D. Wash. 1979). The Supreme Court should settle the question once and for all of what constitutes "an award in a compensation order filed by the deputy commissioner."

The Fourth Circuit's Simmons ruling is founded upon the Fourth Circuit's earlier ruling in Liberty Mutual Insurance v. Ameta & Co., supra.

While the Fourth Circuit has extended Liberty Mutual even further in its Simmons holding, this Court should recognize that the Liberty Mutual rationale has been severely criticized by other courts. See Fearson, supra, Collier, supra; Klitznsky, supra, Dunbar, supra; DeMonte v. Shipping Corporation of India, 476 F.Supp. 392 (S.D. N.Y. 1979); Sea Quest Marine, supra; and the district court opinion in Rodriguez, 456 F.Supp. 1014 (S.D. N.Y. 1978). This Court should exercise its power of certiorari to bring the Fourth Circuit back from its aberrant interpretation of the assignment provision of the Longshoremen's Act.

II

The Fourth Circuit Court of Appeals also ruled that after a statutory assignment, the employer may not voluntarily reassign to the

longshoreman the right to pursue the third party claim. The Fourth Circuit had previously ruled that such voluntary reassignment by the employer was permissible. Caldwell v. Ogden Sea Transport Inc., 618 F.2d 1037 (4th Cir. 1980). However in view of criticism of Caldwell contained in this Court's Rodriguez opinion, the Fourth Circuit in Simmons determined that voluntary reassignments were not permissible. This Court's Rodriguez opinion does not preclude voluntary assignments from the employer to the longshoreman. That question was simply not presented to the Court in Rodriguez and therefore was not answered by Rodriguez. In fact, Rodriguez contains language which supports an employer's right to revest in the longshoreman the right to sue. This Court wrote that "when the §33(b) assignment occurs, it transfers the

employee's entire right to commence a third party action to the employer," 68 L.Ed. 2d at 479, and "the legislative history indicates that once the 6-month period expires, the employer possesses complete control of the 3d-party claims." Id. at 484. If the employer as statutory assignee possesses complete control, he must be able to voluntarily revest the right to sue in the injured worker. Otherwise, by definition, the employer's control is less than complete.

Permitting voluntary reassignment by the employer is also in keeping with prior practice under the Longshoremen's Act. Johnson v. Sword Line, 146 F.Supp. 1940 (E.D. Pa. 1956); aff'd. 257 F.2d 541, 544-46 (3d Cir. 1958); The Owen, 43 F.Supp. 897 (E.D. Pa. 1942); Magee v. McNany, 10 F.R.D. 5 (W.D. Pa. 1950).

Accordingly, since this Court did not preclude voluntary reassignment in its Rodriguez opinion and since prior practice in the Third Circuit and in the Caldwell opinion in the Fourth Circuit permitted voluntary reassignment, the Court of Appeals for the Fourth Circuit erred in holding that voluntary reassignment was impermissible.

CONCLUSION

For the reasons set forth herein, because the Court of Appeals for the Fourth Circuit has created a definition of "award in a compensation order filed by the deputy commissioner" which is markedly inconsistent with the definition of award approved by the Second Circuit in Rodriguez, because the Fourth Circuit definition of award is inconsistent with the statutory language and with the intent of Congress, and because the Fourth Circuit has

misinterpreted this Court's Rodriguez opinion, petitioners herein pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Fourth Circuit entered April 12, 1982.

Respectfully submitted:
John H. Klein,
Ralph Rabinowitz,
Counsel for Petitioners.

CERTIFICATE OF SERVICE

I John H. Klein certify that on July 12th, 1982, 40 copies of this Petition for Certiorari were mailed or delivered to the Clerk, United States Supreme Court and three copies were mailed to:

John B. King, Jr., counsel for Ogden Sea Transport, Inc., Companhia de Navegacao Maritima Netumar, Compania Crasatlantica Espanola, S.A, 2050 Virginia National Bank Bldg., One Commercial Place, Norfolk, Virginia 23510;

Carter B.S. Furr, counsel for Nakliyati, & Hellenic Lines, Ltd., P.O. Box 1039, Norfolk, VA 23501;
and

John R. Crumpler, Jr., counsel for Bank Line and Sea-Land Services, P.O. Box 119, Norfolk, VA 23501.

John H. Klein